

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*W/affidavit
of filing*

75-7063

To be argued by
V. PAMELA DAVIS

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 75-7063

SILAS RAPPNER,

Plaintiff-Appellant,

—v.—

CASPER WEINBERGER, Secretary, Department of
Health, Education and Welfare, Social Security
Administration,

Defendant-Appellee.

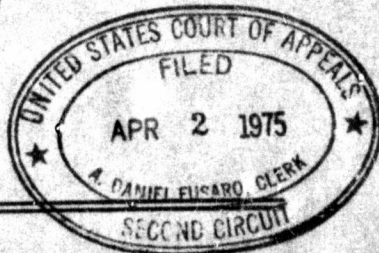
APPEAL FROM A MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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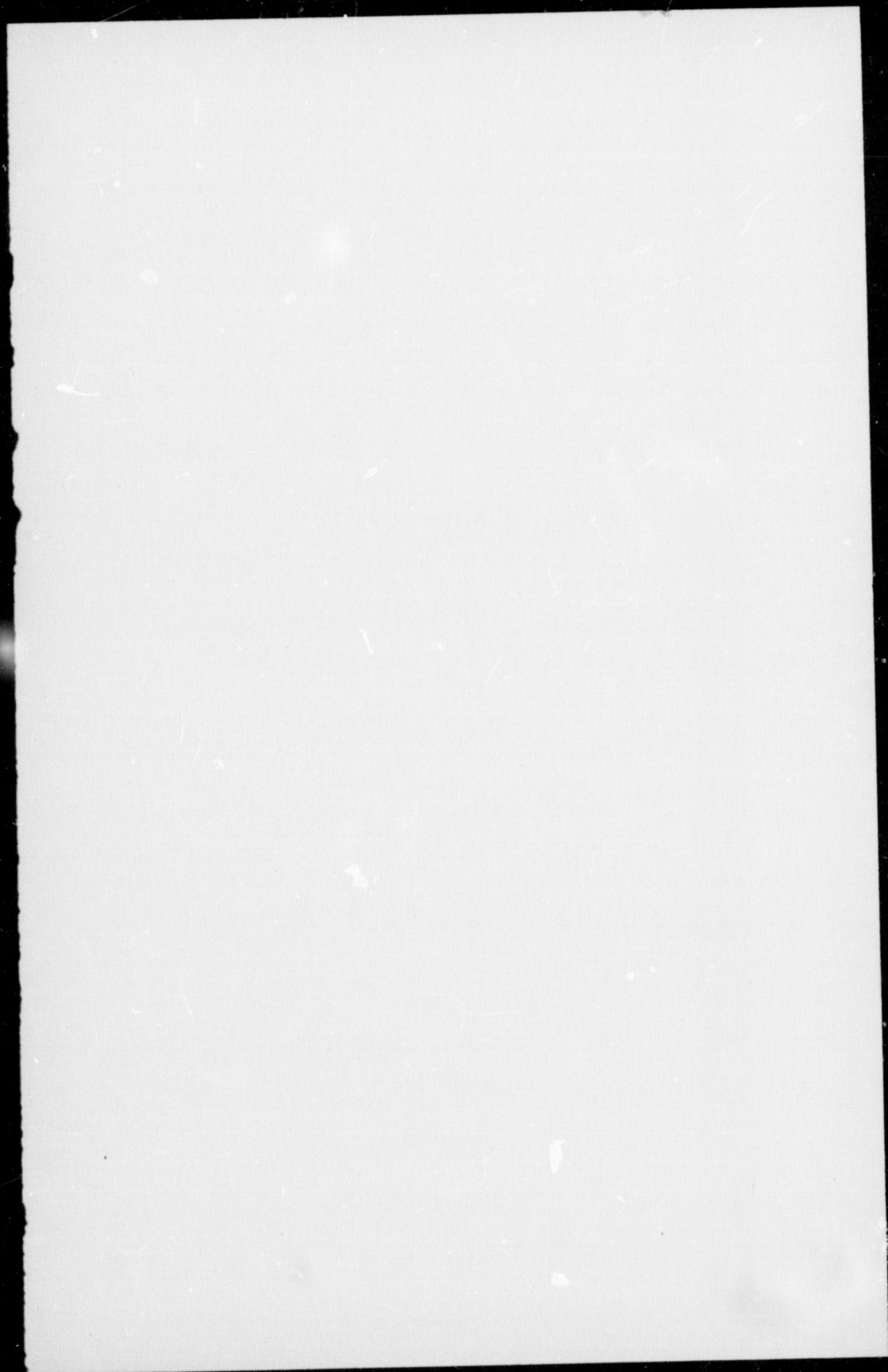


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FOR THE SECOND CIRCUIT

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SILAS RAPPNER,

Plaintiff-Appellant,

—v.—

CASPER WEINBERGER, Secretary, Department of Health,
Education and Welfare, Social Security Administration,
Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

Statement of the Case

The plaintiff-appellant Silas Rappner ("Mr. Rappner") appeals from a memorandum and order entered in the United States District Court for the Southern District of New York on December 11, 1974 by the Hon. Henry F. Werker affirming in part and remanding in part the final determination of the defendant-appellee Casper Weinberger ("Secretary").

Mr. Rappner brought this action for review of the final determination of the Secretary made on November 21, 1972, that Mr. Rappner was not entitled to an increase in his old age and retirement benefits. Mr. Rappner's complaint pursuant to section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), was filed on February 7, 1973 following a grant of extension of time to commence a civil action by the Appeals Council of the Social Security Ad-

ministration. The Secretary duly answered, filing with his answer a certified copy of the transcript of the administrative proceedings below.

On August 28, 1973 Mr. Rappner served a motion to amend his complaint which motion was granted by the Hon. Murray Gurfein at a pre-trial conference held on September 24, 1973.* The document styled by Mr. Rappner as an "amended complaint" was filed September 26, 1973.

By notice of motion filed June 7, 1974 Mr. Rappner moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Secretary simultaneously cross moved for summary judgment.

The District Court, by memorandum and order of the Hon. Henry F. Werker entered December 11, 1974, affirmed the determination of the Secretary that Mr. Rappner was not entitled to increased benefits due to earnings received for work on the Alaskan Highway in 1942, 1943 and 1944, stating that the determination had been based on substantial evidence in the record and was proper. (Slip op., p. 4) The District Court also remanded the issue of Mr. Rappner's claim for increased benefits due to alleged earnings in 1958, 1959 and 1960, as neither the administrative law judge nor the Appeals Council had directly considered the issue in the administrative proceedings below. (Slip op., p. 5). The Secretary was to forward a copy of his final determination to the District Court. (Slip op., p. 6). Judge Werker suggested a hearing not later than January 31, 1975 in the interests of justice, but that hearing was stayed by Judge Werker at the request of Mr. Rappner pending the outcome of this appeal.

* Mr. Rappner misconstrued this decision as a final determination on the legal arguments and exhibits which comprised the "amended complaint."

Mr. Rappner now appeals from that portion of the order of the District Court which remanded the issue of Mr. Rappner's claim of additional benefits from alleged earnings in 1958, 1959, and 1960.

Issues Presented

1. Is the determination of the District Court to remand an issue to the Secretary pursuant to 42 U.S.C. § 405(g) an interlocutory order under 28 U.S.C. § 1292(a) and therefore unappealable?

2. Was the issue of Mr. Rappner's entitlement to increased benefits for alleged earnings in 1958, 1959, and 1960 properly remanded to the Secretary for the taking of evidence and final determination?

Statement of Facts

On March 24, 1962 Mr. Rappner was awarded a monthly benefit of \$50 by the Social Security Administration retroactive to October, 1960. Because of additional earnings in 1961, the benefits were subsequently recomputed by the agency, and a determination made that Mr. Rappner was entitled to \$69 per month. (Slip op., p. 2)

Beginning in 1969 Mr. Rappner alleged to the Social Security Administration that he had additional earnings during the years 1942, 1943 and 1944 which had not previously been taken into consideration in computing his Social Security benefits and which would entitle him to an increased monthly benefit. These earnings were received from certain prime contractors of the United States Government for employment in building the Alaskan Highway between Dawson Creek, Northwest Territory, and Fairbanks, Alaska. (Slip. op., p. 2)

On May 6, 1971 Mr. Rappner requested a hearing on the issue of his alleged earnings in the 1940's which hearing was held on October 20, 1971. Mr. Rappner's claim was denied by the Hearing Examiner (now referred to as Administrative Law Judge) on October 22, 1971. The decision appears in the transcript filed below at page 64.

Mr. Rappner appealed this determination to the Appeals Council which, following an appearance and argument by Mr. Rappner, affirmed the decision of the Hearing Examiner on November 21, 1972. This decision appears in the transcript at page 6. The basis for the determination of the Appeals Council was the failure of the treaty between the United States and Canada, pursuant to which the highway was built, to provide for coverage of that employment by Title II of the Social Security Act. (Tr. p. 9).*

The Appeals Council further determined that Mr. Rappner was entitled to a recomputation of benefits as a result of 1961 earnings but that the recomputation did not result in a higher monthly benefit. (Tr. pp. 9-10).

The submission of Mr. Rappner to the Appeals Council (Tr. pp. 11-15) raised the issue, here on appeal, of his alleged earnings for 1958, 1959 and 1960, but asserted that the evidence in support of such claims would "be forwarded shortly". (Tr. p. 15). These submissions, made part of the record below at pages 16-21 when finally received, were not before the Appeals Council and, therefore, not considered by them when they made their final determination.

The difference between the Secretary's record of Mr. Rappner's earnings and what Mr. Rappner now claims the record should be is summarized as follows:

	<i>Earnings Record</i>	<i>Mr. Rappner's Claim</i>
1958	\$860	\$1495
1959	\$1606	\$2687

* References to the transcript of the administrative proceedings below, filed as part of the record, are referred to as "Tr."

ARGUMENT

POINT I

This appeal must be dismissed because the action of the District Court in remanding to the Secretary for final determination the issue of Mr. Rappner's 1958-1960 earnings is an interlocutory order under 28 U.S.C. §1292(a) and therefore unappealable.

It is the rule in the Second Circuit that a remand of an issue to the Secretary for further hearing and determination pursuant to 42 U.S.C. § 405(g) is not a "final determination" within the meaning of 28 U.S.C. 1291 and that appeals from such determinations must be dismissed. *Dalto v. Richardson*, 434 F.2d 1018, 1019 (2d Cir. 1970).

The *Dalto* case also concerned an action pursuant to 42 U.S.C. § 405(g) for judicial review of a determination of the Secretary denying disability benefits. The District Court vacated this determination and remanded to the Secretary for the taking of additional evidence and the rendering of a decision by the Secretary on that evidence, precisely the action which Mr. Rappner appeals from here.*

* It is noted the non-final nature of the District Court's order is emphasized by the instruction that, following an expeditious decision on the remand, the Secretary "should send a copy of his final determination to this Court" (Slip op. p. 6). No separate appealable judgment has been filed in the District Court as required by Rule 58, Federal Rules of Civil Procedure and Local Rule 10 of the United States District Court, Southern District of New York. See *United States v. Indrelunes*, 411 U.S. 216 (1972). There has been no request for grant of a certificate pursuant to 28 U.S.C. § 1292(b).

The Second Circuit stated in a *per curiam* decision:

However, this court cannot in any case reach the merits of appellant's claims since it appears clear that the order of the district court is not appealable under the provisions of Title 28 governing the jurisdiction of this court. Under 28 U.S.C. § 1291 the action of the district court must constitute a "final decision" in order for it to be an appealable order (subject to exceptions, not applicable here, such as those provided by 28 U.S.C. § 1292(b), 28 U.S.C. § 1651 and Rule 54(b)). The district court acted to vacate the Secretary's decision and remand the case for reconsideration. It neither granted nor denied the relief which appellant seeks. 434 F.2d 1018 at 1019.

As the exceptions noted by the *Dalto* Court are equally inapplicable here, the *Dalto* decision is controlling and the appeal must be dismissed.

POINT II

The District Court properly remanded to the Secretary the issue of entitlement to increased benefits for alleged earnings in 1958, 1959 and 1960.

The issue of entitlement to increased benefits for alleged earnings in 1958, 1959 and 1960, raised in the District Court and here on appeal by Mr. Rappner, was never fully submitted to the administrative tribunals below. Not having seen the evidence pertinent to Mr. Rappner's claim, the Appeals Council could not and did not render an opinion as to whether or not Mr. Rappner did indeed have additional earnings for the years 1958-1960 and whether or not those additional earnings would entitle him to increased benefits. Under these circumstances a remand to the agency charged with the enforcement of the Social

Security Act is appropriate. *Lewis v. Martin*, 397 U.S. 552, 559 (1970).

Indeed, a remand to the Secretary was mandated in this action. Such evidence of Mr. Rappner's alleged 1958-1960 earnings as was included in the record below was insufficient to enable any forum to determine the issue of whether or not such additional earnings would entitle Mr. Rappner to additional benefits.* It must, for example, still be determined that the earnings are "wages" or "self-employment" income within the meaning of 42 U.S.C. §§ 409, 411, that the amounts claimed by Mr. Rappner are net as opposed to gross income, and that their inclusion is not barred by the statute of limitations regarding correction of earnings records pursuant to 42 U.S.C. § 405(c). The District Court noted in its opinion that it was barred from the sort of *de novo* review which would be necessary to grant the relief sought by Mr. Rappner. *Covo v. Gardner*, 314 F. Supp. 894 (S.D.N.Y. 1970). The remand of the issue to allow Mr. Rappner to fully submit his evidence for administrative determination was therefore not only appropriate but was, in fact, the only means by which Mr. Rappner could ultimately succeed.

The Supreme Court has recognized that the Social Security Act represents a "comprehensive complex administrative program." *Richardson v. Wright*, 405 U.S. 208, 209 (1972). The applicable statute and regulations provide the most complete opportunity for determination of issues raised by claimants by the agency charged with the enforcement of the Social Security Act. 42 U.S.C. § 402 *et seq.*; 20 C.F.R. 404.901 *et seq.* As Mr. Rappner was apparently unable to fully present his claim for increased benefits for earnings in 1958-1960 to the Appeals Council below, the decision of the District Court to allow him that opportunity should be affirmed.

* Nor do the exhibits such as A-11, a 1960 Informational Return, mathematically correspond to Mr. Rappner's figures set forth in his brief.

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

Respectfully submitted,

April 2, 1975

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V. PAMELA DAVIS,
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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

 That on the 2nd day of,
 two copies
April 19 75 she served ~~copy~~ of the within

by placing the same in a properly postpaid franked envelope
addressed:

Silas Rapponer,
90 LaSalle St.
NY NY 10027

And deponent further says
s he sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse,
Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

2nd day of April 19 75

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1977